108 FERC ¶ 61,070
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

The Detroit Edison Company,
DTE East China, LLC, and
DTE River Rouge No. 1, LLC

Docket No. ER04-948-000

ORDER GRANTING AUTHORIZATION TO MAKE AFFILIATE SALES, AND CONDITIONALLY ACCEPTING AND SUSPENDING SUBMITTAL

(Issued July 16, 2004)

1. The Detroit Edison Company (Detroit Edison), DTE East China, LLC (East China) and DTE River Rouge No. 1, LLC (Rouge 1) (collectively, Applicants) request Commission authorization for Detroit Edison to engage in limited, short-term purchases of power from affiliates East China and Rouge 1 as may prove necessary to ensure reliable electric service to Detroit Edison's retail native load during the current summer season from June 23, 2004 through September 17, 2004.[1] In this order, we grant authorization to make the requested affiliate sales and accept for filing Applicants' submittal, suspend it for a nominal period, to be effective June 23, 2004, subject to refund and subject to a further Commission order. This action will benefit customers by ensuring reliable electric service to Detroit Edison's native load during the 2004 summer season.

[1] While Applicants request authorization for Detroit Edison to make purchases from these two affiliates, we will treat this filing as a request for authorization for East China and Rouge 1 to make affiliate sales to Detroit Edison. East China's cost-based rate tariff and Rouge 1's market-based rate tariff prohibit sales to Detroit Edison without Commission authorization pursuant to section 205 of the FPA. *See* DTE East China, LLC, FERC Electric Tariff, Original Volume No. 3, Revised Sheet No. 1; DTE River Rouge No. 1, LLC, FERC Electric Tariff, Original Volume No. 1, Original Sheet No. 1.

I. Background

2. Applicants request Commission authorization for Detroit Edison to purchase power from its affiliates, East China and Rouge 1, from June 23, 2004 through September 17, 2004. Detroit Edison is a public utility, serving retail and wholesale electric load in Michigan. East China is the owner of an approximately 284 MW natural gas-fired electric generating station located in Detroit Edison's service territory in East China Township, Michigan. Rouge 1 is the owner of an approximately 260 MW natural gas-fired electric generating station located in River Rouge, Michigan, also in Detroit Edison's service territory. Applicants are each wholly-owned subsidiaries of the DTE Energy Company, and East China and Rouge 1 are affiliates of Detroit Edison.

3. Due to purportedly unforeseen changes in capacity planning, Detroit Edison anticipates a potential 451 MW planning shortfall this summer. Detroit Edison states that it has secured enough generation from non-affiliates for this peak, summer period but that it was able to obtain only a portion of the firm capacity needed to transmit this power, with the remaining transmission capacity (251 MW) available only on a non-firm basis. It states that this transmission capacity limitation is due to more restrictive "Transmission Reserve Margin" requirements on critical cross-state flowgates. Additionally, Detroit Edison states that some of its load which was previously projected to be served by alternate suppliers has recently opted to take service from Detroit Edison instead, accounting for a 200 MW planning shortfall. Detroit Edison claims that, given the lack of transmission capacity into its service area this summer, this additional demand may also only be deliverable on a non-firm basis.

4. Detroit Edison indicates that it has attempted to secure additional power from non-affiliates and has explored redispatch options to address the anticipated shortfall. As an additional measure, Applicants request limited authorization for short-term sales, from East China or Rouge 1 to Detroit Edison, under certain conditions this summer. Applicants state that they will only engage in such transactions under the following circumstances (hereafter referred to as the "Reliability Conditions"): (1) when on a day-ahead and real-time basis Detroit Edison's projected native load exceeds its forecast supply and there is no power available from other sources or (2) when East China or Rouge 1 power is less expensive than Detroit Edison could procure from non-affiliates in the market.

5. Applicants explain that East China's capacity during the summer is committed to FirstEnergy and that FirstEnergy has a right to call on this capacity and energy. However, they state that, to the extent that FirstEnergy does not call upon this capacity, East China would have available energy to sell to Detroit Edison.

Applicants state that East China has Commission authorization to sell energy at cost-based rates and that the Commission has found East China's cost-based rates just and reasonable.[2] Applicants state that East China will only sell energy to Detroit Edison pursuant to its cost-based tariff.

6. Applicants explain that the Commission has authorized Rouge 1 to sell power at market-based rates to non-affiliates. They explain that Rouge 1 does not seek authorization to make the sales proposed here at market-based rates. Rather, they explain that Rouge 1 proposes to price these sales at negotiated rates subject to a cost-based rate cap consistent with the methodology the Commission found just and reasonable for East China.[3]

7. Applicants request waiver of the Commission's 60-day prior notice requirement to permit an effective date of June 23, 2004. Applicants state that good cause for waiver exists because Detroit Edison may be in need of power from its affiliates to maintain reliability and serve its projected retail native load this summer.

II. Notice of Filing and Pleadings

8. Notice of the Applicants' filing was published in the *Federal Register*, 69 Fed. Reg. 40,894 (2004), with comments, interventions and protests due on July 2, 2004. Consumers Energy Company; Mirant Americas Energy Marketing, LP and Mirant Zeeland, LLC; the Electric Power Supply Association (EPSA); and Covert Generating Company, LLC (Covert) filed timely motions to intervene, protests or comments. Applicants filed an answer.

III. Discussion

A. Procedural Matters

9. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2003), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

[2] *Citing* DTE East China, LLC, 99 FERC ¶ 61,315 (2002); DTE East China, LLC, 105 FERC ¶ 61,056 (2003); DTE East China, LLC, 107 FERC ¶ 61,236 (2004).

[3] *Id.*

10. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2003), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Applicants' answer because it has provided information that assisted us in our decision-making process.

B. Affiliate Sales

11. Applicants claim that the requested authorization does not present any affiliate abuse concerns. They state that, under the proposed Reliability Conditions, affiliate sales will only take place when there is no other power available or when power is cheaper than prices available from non-affiliates. Therefore, according to Applicants, there is no possibility that power will be bought from the affiliates at inflated prices at the expense of Detroit Edison’s captive customers. Additionally, they commit to providing documentation that the Reliability Conditions existed at the time of all affiliate transactions. For example, they commit to providing public market price indices or offers received from non-affiliates to demonstrate the market price at the time of any affiliate power purchases. Applicants also note that the Michigan Public Service Commission will be reviewing and auditing this documentation after the summer. Applicants state that the fact that Michigan is a retail choice state also mitigates any affiliate abuse concerns.

12. Covert states that it does not object to affiliate sales between Applicants to address a true reliability problem. However, Covert argues that the Reliability Conditions are poorly defined and questions the second Reliability Condition, claiming that it is not a true reliability concern, but, rather, an economic criterion for purchasing from an affiliate. Both Covert and EPSA are concerned that the proposed authorization would unfairly advantage Detroit Edison’s affiliated generation. Covert claims that there would be no incentive for Detroit Edison to purchase from a non-affiliate because, any time those non-affiliate prices are between the affiliate’s marginal costs and the rate cap, the affiliate would be able to beat the non-affiliate price, even if by a penny. Covert also criticizes Detroit Edison for failing to plan adequately. Covert believes that Detroit Edison’s reliance on short-term supply options for peak periods has lead to the potential supply shortfall and Detroit Edison’s proposed remedy (reliance on the Rouge 1 and East China facilities) will result in an unfair advantage for Detroit Edison’s affiliates.

13. Covert asks the Commission to establish a mechanism to thoroughly examine the proposed affiliate transactions and to encourage Detroit Edison to consider long-term, non-affiliate supply options for future purchases. EPSA also requests that the Commission audit the proposed transactions after they take place and clarify that the transactions, if approved, do not constitute waiver of applicable affiliate rules. EPSA recommends that the Commission condition the filing upon the Applicants’ submission of information confirming the transaction’s financial integrity and the

absence of self-dealing and requests that these affiliate sales be subject to refund pending the Commission's audit of the transactions. EPSA also recommends that, if the Commission determines that an affiliate transaction took place in spite of a feasible offer from a lower cost alternative, the Commission should require East China and Rouge 1 to disgorge all revenues received above their short-run variable cost for the entire summer period.

14. In their answer, Applicants state that they are willing to eliminate the second Reliability Condition, thus limiting purchases to situations in which Detroit Edison forecasts show that there will not be power available from unaffiliated sources to meet its forecast native load requirements. Specifically, Detroit Edison now states that it seeks Commission authorization to purchase power from East China and Rouge 1 this summer only when: "on a day-ahead and real-time basis Detroit Edison's projected native load exceeds its forecast supply and there is no power available from other sources." Detroit Edison states that it will not purchase power from East China or Rouge 1 when power is available from other sources.

15. Under these circumstances, we will grant waiver of the affiliate sales restrictions and grant East China and Rouge 1 authorization to sell power to Detroit Edison from June 23, 2004 through September 17, 2004 only when on a day-ahead and real-time basis Detroit Edison's projected native load exceeds its forecast supply and there is no power available to Detroit Edison from other sources.

16. While we are granting the requested limited sales authorization, we find, based on our preliminary analysis, that Applicants' submittal with respect to any transactions that may ultimately occur has not been shown to be just and reasonable, and may be unjust, unreasonable, unduly discriminatory or preferential or otherwise unlawful. Therefore, we will conditionally accept Applicants' submittal for filing, suspend it for a nominal period, make it effective June 23, 2004,[4] as requested, subject to refund and subject to a further Commission order. In this regard, we will require Applicants to submit, within 30 days of September 17, 2004, a report detailing the hours in which East China and/or Rouge 1 sold, and Detroit Edison purchased, power; the quantities sold and purchased; and the rates charged for those quantities. Applicants must also include in the report an explanation for each purchase and sale as to why it meets the Reliability Condition adopted above. We emphasize that our granting of this limited authorization does not constitute waiver of any otherwise applicable affiliate rules.

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[4] *See* Central Hudson Gas & Electric Corp., *et al.*, 60 FERC ¶ 61,106 at 61,338, *reh'g denied*, 61 FERC ¶ 61,089 (1992).

17. Although we are authorizing the requested affiliate sales for the summer 2004 period, we are concerned that Detroit Edison faces a potential planning shortfall that may result in its reliance on short-term supply from its affiliates. We expect that Detroit Edison will make all necessary planning adjustments so that it will not have to make a similar filing in the future.

18. Applicants have submitted new DTE River Rouge No. 1, LLC, FERC Electric Tariff, Original Volume No. 2, reflecting the rates, terms and conditions for the proposed sales to Detroit Edison. However, this tariff sheet does not contain the originally proposed Reliability Conditions; nor have Applicants submitted revised tariff sheets to East China's cost-based power sales tariff to reflect the proposed sales to Detroit Edison. We direct East China and Rouge 1 to file revised tariff sheets reflecting the terms and conditions of service to Detroit Edison authorized above, within 30 days of the date of this order.

C. Waiver

19. Rouge 1 requests waiver of the requirements of Subparts B and C of Part 35, except sections 35.12(a), 35.13(b), 35.15 and 35.16, and Part 141 of the Commission's regulations in regard to the sales at issue here, consistent with the waiver the Commission granted in a prior order.[5] Due to the limited nature of these sales, we will grant this waiver.

The Commission orders:

(A) Applicants' request for authorization, as modified, for East China and Rouge 1 to sell power to Detroit Edison from June 23, 2004 through September 17, 2004 is hereby granted, as discussed in the body of this order.

(B) Applicants' submittal is hereby conditionally accepted for filing, suspended for a nominal period, to become effective June 23, 2004 (through September 17, 2004), as requested, subject to refund and subject to a further Commission order, as discussed in the body of this order.

(C) East China and Rouge 1 are hereby directed to file revised tariff sheets adopting the rates, terms and conditions of service to Detroit Edison authorized in this order, within 30 days of the date of this order, as discussed in the body of this order.

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[5] DTE River Rouge No. 1, LLC, 91 FERC ¶ 61,139 at 61,539-40 (2000).

(D) Applicants are hereby directed to submit, within 30 days of September 17, 2004, a report, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.